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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**RUSSELL MCCLOUD,**

**Defendant and Appellant.**

**A096219**

**(Solano County  
Super. Ct. No. 151588)**

As part of his negotiated plea agreement below, defendant reserved his right to obtain appellate review of his claim that his speedy trial rights were denied. The Attorney General argues that a claim of speedy trial violation is not cognizable on appeal after a guilty plea, and the Attorney General concedes that the judgment must be reversed to allow defendant to withdraw his no contest plea and to face trial on all charges of the original complaint. We decline to accept the Attorney General's concession of error. We affirm the judgment.

**PROCEDURAL HISTORY**

On December 27, 2000, defendant was charged with driving a stolen car and evading a police officer--charges arising from an incident that occurred on October 4, 2000. Defendant was also alleged to have a prior strike conviction for bank robbery. Shortly after the felony complaint was filed, defendant was sentenced in federal court for

violating his federal parole. On February 2, 2001, he sent a demand to the district attorney that he be brought to trial on the pending charges. Not until April 16, 2001, did the district attorney's office take steps to obtain defendant's release from federal prison for the state criminal proceedings. On May 10, 2001, the federal prison warden authorized defendant's temporary transfer to the Solano County Superior Court.

Following his arraignment in Solano County on the current charges, defendant moved to dismiss the charges on the ground that his speedy trial rights pursuant to Penal Code sections 1381.5 and 1389 were violated. The motion was denied. Thereupon defendant entered into a plea agreement pursuant to which he pled no contest to the charge of evading an officer and admitted a prior strike conviction. In exchange, the additional charge of auto theft was dismissed and defendant was sentenced to the middle term, to be served concurrently with his federal prison term. As an additional element of the plea bargain, defendant reserved the right to appeal his claim that he had been denied his speedy trial rights. Defendant then filed a notice of appeal and obtained a certificate of probable cause.

## DISCUSSION

### A. Background

Penal Code sections 1381.5 and 1389 provide a procedure for federal and out-of-state prisoners to demand that they be brought to trial in California state court so that they might have the opportunity to receive a sentence on pending state charges concurrent with the term of imprisonment they are already serving. An analogous procedure is set out in Penal Code section 1381 for California prisoners to demand a speedy trial of pending California charges. (See generally, *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 221; *Barker v. Municipal Court* (1966) 64 Cal.2d 806, 813.) Penal Code section 1381.5 provides that upon receiving a defendant's request, the district attorney "shall promptly inquire" of the federal prison warden whether the defendant can be released for

trial. If the federal warden assents to the defendant's release, then the district attorney must bring the defendant to trial within 90 days after receipt of such assent.<sup>1</sup>

In the present case, defendant *was* brought to trial within the 90-day period after the prison warden's assent. Defendant asserts only that the district attorney's 2-1/2-month delay following his demand to be brought to trial violated the statutory mandate for a "prompt[]" inquiry to the federal warden. (See *People v. Brown* (1968) 260 Cal.App.2d 745, 751 [10- or 11-month delay was not a prompt inquiry].)

#### B. Appealability

The Attorney General asserts that the issue of speedy trial is not cognizable in this appeal: the attempt to reserve the issue is void and constituted an unlawful inducement for the plea. But we disagree. Issues cognizable on an appeal following a guilty or no contest plea are limited to issues based on "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings resulting in the plea." (Pen. Code, § 1237.5; rule 31(d), Cal. Rules of Court.) Ordinarily, a claim of a speedy trial violation is waived by defendant's no contest plea: "The essence of a defendant's speedy trial or due process claim *in the usual case* is that the passage of time has frustrated his ability to establish his innocence. The resolution of a speedy trial or due process issue necessitates a careful assessment of the particular facts of a case in order that the question of prejudice may be determined. [¶] Where the defendant pleads guilty, there are no facts to be assessed. And since a plea of guilty admits every element of the offense charged, there is no innocence to be established." (*People v. Hayton* (1979) 95 Cal.App.3d 413, 419, fn. omitted, italics added; accord *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357-1358; *People v. Lee* (1980) 100 Cal.App.3d 715, 717; cf. see also *People v. Aguilar*

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<sup>1</sup> Penal Code section 1389 is a more general statute, while section 1381.5 applies to federal prisoners in California specifically and gives a shorter (90-day) period during which the defendant must be brought to trial. Section 1381.5 is the statute applicable here. (*Selfa v. Superior Court* (1980) 109 Cal.App.3d 182, 188.)

(1998) 61 Cal.App.4th 615 [misdemeanors]; *People v. Egbert* (1997) 59 Cal.App.4th 503, 508, 515 [same].)<sup>2</sup>

An exception has been recognized, however, in cases involving a violation of the Interstate Agreement on Detainers (codified in Penal Code section 1389) on speedy trial rights for out-of-state prisoners. (*People v. Cella* (1981) 114 Cal.App.3d 905, 915, fn. 5.) And that exception has been applied equally to cases involving a violation of Penal Code section 1381 for California prisoners. (*People v. Gutierrez* (1994) 30 Cal.App.4th 105, 108.) The courts have reasoned that the statutes call for a *mandatory* dismissal if the charges are not resolved within the specified time limits; hence, an erroneous denial of a defendant's motion to dismiss goes to the legality of the proceedings notwithstanding the defendant's actual guilt.<sup>3</sup> (*Ibid.*)

Penal Code section 1381.5 is substantively identical to sections 1381 and 1389. It, too provides, that "[i]f a defendant is not brought to trial . . . as provided by this section, the court in which the action is pending shall, on motion . . . of the defendant or his counsel, dismiss the action." Case law construing section 1381 has been held to be "persuasive authority" for interpreting the analogous section 1381.5. (*People v. Vila* (1984) 162 Cal.App.3d 76, 81.) We can find no reason to distinguish *Cella* and *Gutierrez*. Accordingly, we conclude that defendant is entitled to raise the issue on appeal.

### C. Speedy Trial Claim

We find no merit in defendant's argument that the district attorney failed to comply with Penal Code section 1381.5. The statutory procedure comes into play when the defendant "has entered upon a term of imprisonment in a federal correctional

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<sup>2</sup> Neither the trial court's acquiescence in the defendant's expressed intention to appeal nor the issuance of a certificate of probable cause will make cognizable issues that have been waived by a plea of guilty. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9; *People v. Hernandez, supra*, 6 Cal.App.4th at pp. 1360-1361.)

<sup>3</sup> Although dismissal is mandatory, the charges may be refiled. (Pen. Code, § 1387; *Crockett v. Superior Court* (1975) 14 Cal.3d 433, 439; *People v. Gutierrez, supra*, 30 Cal.App.4th at pp. 109, 111.)

institution located in this state.” Here, defendant made his demand to be brought to trial on February 2, 2001, when he was still in county jail awaiting transfer to a federal facility. Not until March 29 was he sent to Terminal Island to serve his federal sentence. Within less than a month--on April 16 and again on April 26--the district attorney applied for and obtained a writ of habeas corpus ad prosequendum to obtain defendant’s release from federal prison. The trial court found that the district attorney acted reasonably and we entirely agree with that assessment. There is simply no doubt that the district attorney acted “promptly” under the circumstances.

In any event, defendant has failed to demonstrate prejudice. Although a defendant is not required to show prejudice upon a motion to dismiss for noncompliance with the statutory time limits, he is required to show on appeal that the erroneous denial of his motion was prejudicial. (*People v. Martinez* (2000) 22 Cal.4th 750, 769; *People v. George* (1983) 144 Cal.App.3d 956, 960.) Here, the statute of limitations had not expired so as to preclude refiling. Defendant’s motion to dismiss was denied on August 14, 2001, less than one year from the date of the offenses. Nor does defendant make any argument that a prior dismissal barred refiling.<sup>4</sup> Moreover, defendant did not lose the opportunity to serve concurrent time. His four-year prison term was made concurrent to his federal prison term for parole violation, and he was given credit for 331 days actually served in federal custody.

#### DISPOSITION

The judgment is affirmed.

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<sup>4</sup> The record indicates that defendant was initially charged in Contra Costa County, but the charges were dismissed for lack of jurisdiction. The complaint was then filed in Solano County. Defendant makes no argument that the dismissal in Contra Costa County would have rendered the dismissal here a bar to subsequent refiling. Indeed, a dismissal

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Jones, P.J.

We concur:

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Stevens, J.

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Gemello, J.

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for a jurisdictional defect (Pen. Code, § 1004, subd. (1)) does not come within the bar of Penal Code section 1387.